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Londo H. Brown

West Virginia University College of Law

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WEST VIRGINIA INDETERMINATE SENTENCE AND PAROLE LAWS*

LONDO H. BROWN**

WHILE this part of the study is supposed to be a study of West Virginia's indeterminate sentence law, it is in reality a study of this state's indeterminate sentence and parole laws. No indeterminate sentence law can be of value unless it is correlated to an adequate parole law, and, it is said, no parole law can be of full value unless it is used in conjunction with an indeterminate sentence law.

At the outset several generalities may be set forth. There is no perfect answer to the penal problem. When men and women must be deprived of their liberty for the benefit of society it is at best an unhappy business. There is no way of completely satisfying the prisoners or, in most cases, their families, short of releasing them completely. No system of laws is better than the person who administer those laws make them. No administrator or administering board can do a good job of administering laws without adequate funds for personnel. The most that a report of the results of this study can do is to point out what system of laws seems best in theory, since the system which is best in theory stands the best chance of being the best in practice. The report can also show how West Virginia's laws have fared in practice.

Indeterminate Sentence Laws

The idea of making the punishment fit the crime without any regard to the individual who is being punished has largely given way to the more modern idea of imposing a punishment to fit the individual. While an embezzlement is always an embezzlement, not all embezzlers are alike in the harm actually done by them, in the motive for their crimes, in their emotional make-up, social background and other relevant circumstances.¹

Fitting the punishment to the individual can be done under a

* This is the second part of a report made to the Joint Committee on Government and Finance and the Commission on Interstate Cooperation of the West Virginia Legislature. The first part of this report was on the subject of West Virginia's habitual criminal law and appeared in the preceding issue of the *Law Review*.

** Professor of Law West Virginia University.

¹ Glueck, *Indeterminate Sentence and Parole in the Federal System*, 21 B.U.L. Rev. 20 (1941).

definite sentence system of laws if that system is like West Virginia's system prior to 1939. Under that system, sometimes called an indeterminate system because no definite sentence is set by statute, the court could impose a definite sentence within the limits of a minimum and maximum time set out by statute for the particular crime for which the person to be sentenced was convicted. Thus, the court could make the punishment fit the individual if it so desired insofar as those limits would allow. The trouble with that system is that the length of the sentence too often depends upon the individual judge and not the individual criminal as will be shown later in this report.

For the purposes of this report that type of sentence will be referred to as a definite sentence since the court sets a fixed term to be served. A system of sentencing whereby the court imposes a term of not less than a certain time nor more than a certain time will be referred to as an indeterminate system of sentencing. There are two types of indeterminate sentences. One, like West Virginia's present type, is where the court must impose the minimum and the maximum set out by statute for the offense for which the person to be sentenced was convicted, sometimes referred to as a general sentence. The other is where the court can impose a minimum and a maximum within the limits of the time set out by statute for the offense.

Under an indeterminate or general sentence law, coupled with an adequate parole law, a much better method of making the punishment fit the individual is provided, in theory at least. This system has at least two advantages over the definite sentence. One advantage is that the likes and dislikes of the sentencing judge is replaced by the likes and dislikes of a director or board of parole. At least this results in a greater uniformity in the amount of time to be served since the paroling authority's jurisdiction is state-wide, and in the case of a parole board, there is less individual personality injected into the matter. The other advantage is that the decision as to the length of time to be served need not be made in a short time with only the limited knowledge concerning the defendant gained during a trial or plea of guilty and from police officers, who generally have investigated the crime, but not the individual, as a guide. An adequate parole system should provide for a complete investigation of all pertinent facts about the convicted person made by a competent parole officer. On the basis of this investigation, which should include recommendations from the trial judge and prosecuting at-

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torney, and a prison conduct record from the warden of the penitentiary, the director or board of parole should be in a better position to know when a prisoner should be released than is the court at the time the sentence is pronounced. If the main function of punishment is the reform of the convicted person, as many persons in this field claim, then the exact time he should serve before being discharged cannot properly be determined at the time the court imposes sentence.

The first real indeterminate sentence law was passed in this country in New York in 1877.² That law provided for a general sentence to prison, with power to release from prison in a prison board at any time prior to the expiration of the maximum time provided by statute for the particular offense. The prison board prescribed rules and regulations to govern prisoners while on parole, and paroles could be revoked at any time by the board. This law served as a model for many state laws, and if you substitute West Virginia's parole board of today for the prison board, you have substantially our present indeterminate sentence and parole laws.

Today, thirty-five states, including West Virginia, have indeterminate sentence laws applicable to at least some offenders sentenced to the state penitentiaries.³ In addition to these states the District of Columbia and the Territory of Hawaii have such laws, making a total of thirty-seven jurisdictions with indeterminate sentence laws.⁴

Of the thirteen states which do not have indeterminate sentence laws five have had such laws and repealed them. Kentucky, Montana and South Carolina repealed theirs prior to 1930 after relatively short trials. Alabama and Louisiana repealed theirs between 1935 and 1940. Attempts were made during this study to obtain information from some of these states as to their reasons for repealing their laws, but I was unable to get such information due to the intervening years.

Most jurisdictions, including West Virginia, exclude certain offenses from their indeterminate sentence laws. Like West Virginia, they exclude misdemeanors, capital offenses and certain infamous crimes. For these crimes definite sentences are provided as a rule. In West Virginia, the court can impose a definite sentence ranging

² N.Y. Laws 1877, c. 173.

³ ILLINOIS LEGISLATIVE COUNCIL, *INDETERMINATE SENTENCE AND PAROLE LAWS* (Publication 105, 1940).

⁴ D.C. CODE § 24-203 (Supp. III, 1954); Hawaii Laws 1945, § 10842.

from a statutory minimum to a statutory maximum for most of these crimes.

Constitutionality

These laws have been attacked on the grounds that they impose cruel and unusual punishment, that they are an unlawful delegation of the legislative or judicial power to an administrative body inasmuch as the parole director or board actually decides the amount of time to be served, and that they constitute an infringement upon the pardoning power of the governor in giving other authority the power to parole. The laws have generally been upheld.⁵ Our court stated that our law was constitutional without going into much detail in the case of *Cohn v. Ketchum*.⁶

Uncertainty of Time to be Served Under Indeterminate Sentences

It is often stated that an indeterminate sentence law is unfair to the prisoner and is the cause of dissatisfaction and unrest on the part of prisoners sentenced under such law and so causes a prison disciplinary problem. While this may be true in some jurisdictions, there are answering arguments which tend to favor such sentences over definite sentences. Dissatisfaction is a part of prison life as prisons were never intended to be places where prisoners would be satisfied.

While not knowing when he is going to be discharged may add to a prisoner's dissatisfaction, he does have knowledge of this fact to a certain extent even when he is confined under an indeterminate sentence. The effect of a sentence under West Virginia's indeterminate sentence law is that a prisoner is sentenced to the maximum term provided by law for the offense for which he was convicted. Therefore, a prisoner sentenced to not less than one nor more than ten years in West Virginia Penitentiary for the crime of grand larceny knows that he will be discharged in ten years, less any good time earned, if he is not sooner paroled. If the court could sentence a person to a definite sentence within the statutory limits for that crime, as was the case in West Virginia prior to 1939, and the court should choose a sentence of ten years, as some

⁵ Lindsey, *Historical Sketch of Indeterminate Sentence and Parole Laws*, 16 J. CRIM. L. 9 (1925-26).

⁶ 123 W. Va. 534, 17 S.E.2d 43 (1941).

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West Virginia courts did, the result would be the same except that under West Virginia's present laws there is a greater possibility of parole. As will be shown, such prisoner would not be eligible for parole under our present parole laws until he had served one-third of such definite sentence whereas he would be eligible for parole under such laws after one year, the minimum sentence for this crime, if sentenced under our indeterminate sentence law. On the other hand, the court would not likely impose a definite sentence of ten years if the person were a fit subject for an early parole.

During the course of this study several persons at West Virginia Penitentiary, including prisoners, were interviewed and were asked questions on this subject. The warden, deputy warden, business manager and captain of the guard at the penitentiary all stated that to their knowledge there was no particular dissatisfaction and unrest among the prisoners due to the indeterminate sentence law. Several prisoners who were serving indeterminate sentences stated that they would prefer a definite sentence to an indeterminate one, but they seemed to have no strong feelings concerning the matter. Two prisoners serving indeterminate sentences and one serving a definite sentence stated that they preferred an indeterminate sentence to a definite one, and all three stated that they knew of no unrest in the penitentiary due to the indeterminate sentence law. However, one of the prisoners serving an indeterminate sentence who favored that law had recently learned that he was to get a fairly early parole, and the prisoner serving the definite sentence favored the indeterminate sentence because of the earlier parole eligibility under such law. He is serving a ten year sentence for armed robbery and will not be eligible for parole until he has served one-third of that time, or forty months. Under an indeterminate sentence of one to ten years a prisoner is eligible for parole in one year.⁷

A further argument against the contention that an indeterminate sentence is unfair to the prisoner because of the uncertainty of the length of time to be served is that such a sentence is a good crime deterrent for that reason. Again it might be said that prison is not supposed to be a bed of roses. One article, in giving five major arguments in favor of indeterminate sentence laws, lists as the first argument the fact that the deterrent force presented by the uncertainty of incarceration for a relatively unknown period is probably

⁷ See W. VA. CODE c. 62, art. 12, § 13 (Michie 1955).

greater than the deterrent force attending a definite sentence which enables the prisoner, by deducting rigid good time allowances, to calculate in advance what may be the maximum length of imprisonment.⁸

Furthermore, it must be kept in mind that every prisoner will, unless he dies in prison, become a citizen again. For this reason, the fact that a prisoner knows the length of time he must serve depends to a great extent upon his reformation into a trustworthy citizen may be of some benefit. Under an indeterminate sentence the prisoner must prove himself worthy of an early release or he will be kept for the maximum time, and so there is some incentive for improvement.

Of course, this could be true under a definite sentencing system because a parole system can work with that system also. However, it would not be true in many cases because under such a system there are usually many short sentences of a year or a year and a half. This was certainly the case in West Virginia. As appears later in this report, the average time served in West Virginia Penitentiary under definite sentences for several crimes, the statutory maximum for which was ten years, was under two years during the years of 1937 and 1938. There is very little opportunity for parole to work in such cases, and prisoners with such sentences must be unconditionally discharged at the expiration of their sentences regardless of their conduct in prison and their attitude toward society. At least under an indeterminate sentencing system those who show themselves to be unworthy of citizenship can be kept from preying upon society for a longer period.

Mr. James Phillips, member of the Virginia Parole Board and member of the Committee on the Standard Probation and Parole Act of the National Probation and Parole Association, made the following comment during a discussion of a section of the standard act:

"It is my belief that the indeterminate sentence is the only proper way to coordinate the functions of the court, the correctional system, and the parole authority. It is, therefore, in my judgment essential to a parole act. The observation that a parole system works with definite sentences is accurate but does not consider how much better it could work otherwise. Virginia may not be typical, but out of 1800 commitments a year there are a substantial number of one- and two-year commit-

⁸ Note, 50 HARV. L. REV. 677, 684-85 (1937).

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ments, probably 50 per cent. Take a one-year sentence and try to visualize any program of rehabilitation. On the thesis that supervision should not extend past the fixed sentence, how can anything adequately be accomplished within the framework of such a sentence? It is my belief that definite-sentence states elsewhere will have this terrific group of short-sentence persons in which adequate treatment and parole have great difficulty because of the limitation of time."⁹

Indeterminate vs. Definite Sentences

As stated in the beginning of this report, a study of indeterminate sentence laws necessarily includes a study of parole laws, for without adequate parole laws the theory of indeterminate sentence laws must fail. This theory is that one of the principal functions of punishment is to reform the convicted person and that the trial judge is not in a position to determine in advance when reform will take place. A paroling authority is in a much better position to determine this after receiving a report upon the prisoner's conduct while incarcerated and a report of an investigation of his opportunities insofar as home, employment and community sentiment are concerned. Under an indeterminate sentence law the trial judge or the paroling authority, or both, can adjust the time served in prison to the past record and future possibilities of each prisoner.

If the trial judge does have the authority to set the length of time the convicted person shall serve at the conclusion of the trial, or soon thereafter, his judgment at that time is final, and the prisoner will be released at the expiration of the sentence meted out at that time. If the prisoner is not reformed at the expiration of his sentence, the only way to get him confined in the penitentiary again so as to protect society is to wait until he is convicted of some new offense punishable by confinement in the penitentiary.

Under an indeterminate sentence law, the decision of the paroling authority as to when a prisoner should be released is not final because, if he shows that he is not reformed after he is released by the board, he is subject to being sent back to prison without trial to finish out his term.

Of course, parole is useful under a system of definite sentencing also. But the main difficulty is that one person, the trial judge, decides the amount of time an offender shall serve and another

⁹ NATIONAL PROBATION AND PAROLE ASS'N, STANDARD PROBATION AND PAROLE ACT 24 (1955).

person or group of persons, the parole director or board, decides whether the offender should be released before that time is served. In answering a questionnaire on the subject which I mailed to every judge in the state who tries criminal cases, every judge who responded indicated that he did not believe that a sentence administered under a definite sentence system should be longer than the court thought warranted in the particular case even though there might be a possibility of parole before the term was served. Thus, the court would impose a sentence which it believed suited to the individual and the crime and then the paroling authority would in some instances parole before that sentence was served. This would be all right where the court imposed too long a sentence in the first place, but in cases where the court and the paroling authority agreed as to the length of time which should be served there would be no parole, and consequently no supervision and aid for the released prisoner.

The tenor of this report favors the indeterminate sentence, but this is because of its widespread acceptance and because most of the written material on the subject favors it. Yet the definite sentence has not lost out entirely. As has been stated, five states have repealed their indeterminate sentence laws within the past 40 years, although none have done so recently.

There is considerable dissatisfaction with the law in this state among legislators, judges and prosecuting attorneys. But these dissenters do not appear to be in a majority, at least so far as judges and prosecutors are concerned. This is evidenced by the results of the questionnaire sent to those two groups which show that of the answering judges 15 favored West Virginia's present law and seven opposed it, and that of the answering prosecutors 15 favored the law and 22 opposed it. Thus, it appears that the judges, from whom the law takes the sentencing power since they must impose the statutory penalty in every case, predominately favored the law. Some of the prosecutors, either in comments on the questionnaire or in separate letters, indicated that they favored a definite sentence law because they could better bargain with an accused person under such a law by promising to recommend a low definite sentence if he would plead guilty.

So, it appears that the judges exercising criminal jurisdiction and the prosecuting attorneys in West Virginia, the group which administers sentencing laws, would not be satisfied as a whole if

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the indeterminate sentence law were repealed and a definite sentence law enacted in its place, or if the law were left as it is. However, of the 30 judges and prosecutors who indicated that they were in favor of our indeterminate sentence law, 12 indicated that they believed that the law should be changed in some particulars. Only nine indicated that they did not believe that the law should be changed. Most of the 12 who favored changes suggested an amendment whereby the court could impose a higher minimum sentence than the statutory minimum sentence prescribed for the particular offense. One judge suggested that any change should contemplate some parole supervision for all prisoners released from the penitentiary regardless of when they are released. This suggestion is highly meritorious in the opinion of the maker of this study.

It is very probable that amending West Virginia's indeterminate sentence law so as to allow the court to fix minimum and maximum terms within the limits of the prescribed statutory penalty for the crime committed would satisfy many judges and prosecutors whether they are in favor of the existing law or not.

Another thing which shows that opposition to indeterminate sentence laws is not dead in the United States is that fact that the Committee on the Standard Probation and Parole Act, a group composed of judges, members of parole boards, attorneys, law professors, wardens, probation and parole officers, sociologists and police, could not agree on the matter when it came up for discussion in the drafting of the standard act in 1955. The form of the sentence was the only major area in which essential unanimity of opinion did not come out of committee deliberations according to a comment following section 12 of the act. However, an indeterminate sentence provision whereby the statutory maximum for the crime for which the person was convicted was finally agreed upon by the majority, along with a provision allowing the court to fix a minimum sentence which in no case could exceed one-third of the statutory maximum.¹⁰ It will be noticed that this is about the same law which would result in West Virginia if our laws were changed in the manner suggested by several judges inasmuch as they suggested that the court be given the power to impose a higher minimum sentence.

¹⁰ *Id.* at 19-20.

Disparity of Sentences Under Definite Sentence System

Even under a definite system of sentencing there would be a great amount of dissatisfaction among the prisoners in the penitentiary due to inequality and disparity of sentences. Prisoners are congregated there from all of the judicial circuits in the state and a first offender convicted of grand larceny in one court and sentenced to a definite sentence of five years would find several second and third offenders convicted of the same offense in other courts sentenced to one and two years. This was the case in West Virginia prior to 1939 as is illustrated by the fact that on May 26, 1938, two persons with no prior convictions were sentenced to ten years each for grand larceny in Logan County while two persons with one prior conviction each were sentenced to one year each in Cabell County for the same offense on December 29, 1937, and May 10, 1938. On November 14, 1937, one person with four prior convictions was sentenced to two years for this offense in Cabell County.

While this may be accounted for by the fact that the two courts may have been making the punishment fit the individual instead of the crime in these cases, this was not likely the case as the average sentence for the 15 convictions for grand larceny in Logan County for the years of 1937 and 1938 was four and one-fifth years and in Cabell County the average sentence for the 27 convictions for this crime was two and two-third years for the same period. During this period Mercer County had an average sentence of four and one-eighth years for its 13 convictions for this crime, while Raleigh County had an average of two and one-fourth years for its 19 convictions, and McDowell County had an average of one and three-fourths years for its 16 convictions. The last two counties adjoin Mercer County. Kanawha and Fayette Counties both had over 30 convictions for this crime during this period and Kanawha County had an average sentence of two and two-thirds years and Fayette County had an average of two and one-third years for the crime. Sentences for this crime in individual counties varied during this period in every case checked except Monroe County which had only three convictions and the sentence was three years in each case. In Logan County the average sentence for grand larceny in 1937 was five and three-fifths years and in 1938 was three and one-half years. And in Logan County one person with three prior convictions received a sentence of five years in 1937 for this crime while the two above-mentioned persons with no prior convictions received sentences of ten years each in 1938. Two months

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prior to the imposition of these two sentences a person with no prior convictions received a sentence of one year for grand larceny.

As has been shown earlier in this report, one of the greatest causes of dissatisfaction and unrest among persons in West Virginia Penitentiary sentenced to life imprisonment as habitual criminals is the fact that there is so much discrimination in imposing such sentence. Only a few who are subject to be sentenced for life as habitual criminals in West Virginia are so sentenced and they feel that they have been treated unfairly. The same situation could prevail in regard to a disparity of sentences under a definite sentencing system.

In an article in the Boston University Law Review in 1940, Matthew F. McGuire and Alexander Holtzoff, then Assistant United States Attorney General and Special Assistant United States Attorney General respectively, made the following statement:

"That such great divergence exists is easily demonstrated. Several years ago a statistical study was made of the average sentences imposed by every Federal district judge in cases involving violations of the liquor laws, which numerically represent by far the largest number of criminal offenses within the cognizance of the Federal courts. The computation made for the fiscal year ending June 30, 1935, showed that the average sentence for imprisonment imposed in such cases by one judge was 851 days, while the average sentence imposed by another judge in such cases was 40 days. The averages of all other judges ranged between these two poles.

"During the same period in narcotic cases, the average sentence of imprisonment imposed by one judge was 3,468 days, and by another judge 31 days, the averages of all the other judges being between these two extremes.

"For the fiscal year ending June 30, 1938, the average sentence of imprisonment imposed in liquor cases varied between 815 days and 40 days; in narcotic cases, between 1868 days and 98 days. For the fiscal year ending June 30, 1939, the average sentence of imprisonment imposed in liquor cases varied between 1,825 days in one district, and 100 days in another; and in narcotic cases between 1,840 days in one district and 137 days in another."¹¹

The same writers gave specific illustrations of sentences imposed by different federal district courts which seem to be worth quoting.

¹¹ McGuire and Holtzoff, *The Problem of Sentencing in Criminal Law*, 20 B.U.L. Rev. 423, 427 (1940).

"(Case A) In an eastern city a sixty-three year old offender was sentenced for the sale of \$500 in counterfeit money. He had a previous criminal history covering a period of thirty years and including four penitentiary sentences and several jail sentences for such offenses as counterfeiting, burglary, and carrying concealed weapons. He was an unstable, habitual alcoholic—a man who had spent so large a portion of his existence in professional criminality and in penal institutions as to render him unfit for adjustment in society. In this case the court imposed a sentence of one year and a day.

"(Case B) In another district a thirty-two year old offender was sentenced for an attempt to pass a counterfeit Ten Dollar Federal Reserve Note. He had never been previously arrested, was the product of a broken home, was poorly educated, and had a history of only intermittent employment. In this instance a sentence of seven years was pronounced.

"Two other illustrations are found in the auto-theft group:

"(Case C) A twenty-nine year old offender who had stolen two cars and had previously served two penitentiary sentences for grand larceny was brought to the court in a Western District. This man had had better than average home environment, a fair education, but had practically no history of legitimate employment and had supported himself largely by theft. The sentence imposed was for fourteen months.

"(Case D) In another court not far distant, a twenty-four year old youth was tried for the theft of a car which was left by the roadside. He had never been previously arrested. His education and family background was similar to those in the other case cited. The sentence imposed was five years.

"The narcotic offender group offers additional illustrations:

"(Case E) In one of the Eastern Districts a thirty-one year old non-addict was arrested in possession of fifteen pounds of smoking opium. The man had had a lengthy police record, had served a work house sentence and a previous penitentiary sentence for violation of the Narcotic Act. He had lived most of his life in the slums, was the product of a broken home, had meager education, but a fair work history. He received a sentence of a year and a day.

"(Case F) A thirty-six year old offender was arrested and brought to trial in one of the far Western Districts after making a sale of six grains of morphine to an informer. This man had served six jail sentences ranging from 30 to 90 days for petty offenses. In this case the court imposed a sentence of ten years."¹²

¹² *Id.* at 429-30.

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Others, including Felix Frankfurter, now Associate Justice of the Supreme Court of the United States, have criticized the definite sentence system because of the disparity of sentences which usually prevails under that system.¹³

Bargain Justice

Another objection to the present system is that the placing of the sentencing power in a central board takes away from the prosecuting attorney the opportunity to arrange for pleas of guilty in exchange for his promise to recommend to the court that a short sentence be imposed. This practice of "bargain justice", the bargaining for short sentences or other considerations in exchange for pleas of guilty is very controversial. Because of the sheer volume of business going into the prosecuting attorney's office in some counties, it could be a great help in the saving of time and expense. But it is a practice which probably should be curbed to some extent simply because such bargaining power can readily be, and no doubt sometimes is, the subject of abuse. This criticism of the indeterminate sentence is not often put into express words, but one West Virginia judge who is opposed to the indeterminate sentence law stated in a letter that,

"The indeterminate sentence law also puts out of the question the matter of bargaining with counsel as to the sentence imposed. I have used the word 'bargaining' because it is ugly and the practice is generally considered to be ugly. I do not find it particularly so, although I have employed it as little as possible."

The practice of bargaining is also used in regard to the habitual criminal law as has been pointed out earlier in this report. Even with the indeterminate sentence law, it is still possible for the prosecutor to bargain with the accused in several ways. He can arrange to accept a plea of guilty to a lesser offense carrying a lighter penalty than the one for which the accused stands indicted, and this is undoubtedly often done. He can promise a recommendation for probation in exchange for a plea of guilty; or to recommend the dismissal of other charges, or the imposition of concurrent sentences, in exchange for such a plea.

A study made in 1954 in a jurisdiction where the court could

¹³ See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE UNITED STATES SUPREME COURT* 250 (1928); see also Potts, *Unification of the Judiciary, A Record of Progress*, 2 TEXAS L. REV. 445, 460 (1924).

play a large part in the sentencing procedure showed that pleading guilty in consideration of a lighter sentence accounted for 45.5% of the bargaining pleas considered in the study. The author concluded that while bargain justice may be an expedient and, at the present time a necessary and legitimate legal phenomenon in certain cases, yet it has harmful effects in that it breeds disrespect for the law and law officials, gives the experienced criminals an advantage over the inexperienced, and where it is misused it exploits the accused or subjects the community to danger.¹⁴

Average Time Served Under Definite and Indeterminate Sentences

The actual time served in prison under an indeterminate sentence law for a given offense is usually greater than the average time served for the same offense under a definite sentence law. At least this is true in some jurisdictions.¹⁵ A comparison of the length of time served in Joliet Prison in Illinois under definite and indeterminate sentences over two five-year periods showed that the average time served for burglary, larceny and robbery was approximately one year and nine months under definite sentences, and the average time served for the same crimes under a later indeterminate sentence law was approximately two years and six months.¹⁶ A study in Minnesota arrived at substantially the same result.¹⁷

In a report entitled "Prisoners in State and Federal Prisons and Reformatories, 1948", prepared by the United States Census Bureau, it is stated that persons sentenced to a given term under definite sentences served a slightly longer time than persons sentenced to the same term under indeterminate sentences. However, the same report shows that persons are generally sentenced to longer terms under indeterminate sentence laws. For example, the report shows that 67% of definite sentences are for no more than four years, while 74% of indeterminate sentences are for more than five years. Therefore, the report clearly shows that prisoners served substantially longer terms under indeterminate sentences than under definite sentences in the United States prior to 1948. Presumably this

¹⁴ Newman, *Pleading Guilty for Consideration: A study of Bargain Justice*, 26 J. CRIM. L. 780 (1956).

¹⁵ Note, 50 HARV. L. REV. 677, 685 n.36 (1937).

¹⁶ Lindsey, *A Brief comparative Study of Indeterminate Sentence and Parole Statutes*, 16 J. CRIM. L. 70, 76, (1925).

¹⁷ *Ibid.*

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report included figures from several states having indeterminate sentence laws under which the court or jury could set the maximum sentence at less than the statutory maximum.

A survey of the commitment records of West Virginia Penitentiary, made during the course of this study, showed that during the years of 1937 and 1938, when the courts of this state were using definite sentences almost entirely, the average time served by 863 prisoners committed during those years under definite sentences for entering, breaking and entering, grand larceny and auto theft was slightly under two years. The commitment records for the years of 1947 and 1948, when sentences for all these crimes were of the indeterminate type, showed that the average time served before parole by 438 prisoners committed during those years for these crimes was approximately three and one-fourth years.

The above-named crimes were chosen because the maximum sentence for all of them was ten years during the year considered, and because they constituted the largest group of commitments by far. The above figures for the years of 1947 and 1948 do not include the time served by 245 prisoners committed under indeterminate sentences for the named crimes during those years who were not paroled. The average time served by this group of prisoners would have had to be over five years since none of them were discharged in less than five years from their effective sentence date and a few of them are still in the penitentiary serving their sentences. Neither do these figures include the extra time served by 81 prisoners serving indeterminate sentences for those offenses who were paroled, had their paroles revoked and then were returned to the penitentiary to finish out their sentences if not reparaoled. So, it appears that in West Virginia prisoners are serving a much longer time on the average under indeterminate sentences before parole than they did serve for the same crimes before unconditional discharge under definite sentences. After they are paroled they are subject to reincarceration if they become guilty of anti-social conduct. After unconditional discharge under the definite sentence system they could not be returned to the penitentiary unless they were convicted of another felony regardless of their conduct and attitude toward society.

Which Type Indeterminate Sentence Law?

Even if it is determined that an indeterminate sentencing system is to be preferred over a definite system, there still remains

the question of whether our system of indeterminate sentence is to be preferred over a type where the court or jury fixes a minimum and maximum within the limits set by statute for the particular offense. In West Virginia the statutory minimum and maximum is automatically imposed so that if the statutory penalty is not less than one nor more than ten years, as for grand larceny, then that is the sentence which must be imposed if a person is convicted of that crime. Thirteen other jurisdictions have the same or a similar type indeterminate sentence law.¹⁸ Twenty other jurisdictions empower the court to fix the maximum and minimum within the statutory limits and three allow the jury to do so.¹⁹

In numbers then, the system allowing the court to fix the indeterminate sentence predominates. If the parole law of the jurisdiction provides, as does West Virginia's, that no parole can be granted by the parole board until the expiration of the minimum sentence, then this system provides a sentencing method which gives both the court and the parole board appropriate roles and there is much to be said for it.

However, this system lends itself to disparity of sentences as the court or jury is limited only by the statutory minimum and maximum time. Thus, where the minimum is one year and the maximum is ten years, as for grand larceny, one court may generally mete out sentences of not less than one nor more than two years for this offense and another not less than six nor more than ten for it. Also, courts may, and some have under such a system, virtually make definite sentences out of their sentences by fixing the maximum time at slightly more than the minimum time. Thus, in a Kentucky case,²⁰ an indeterminate sentence of not less than one nor more than one year and one day was upheld, as was a sentence of not less than 20 years nor more than 21 years in a New York case.²¹

¹⁸ Others are Arkansas, California, Hawaii, Idaho, Iowa, Kansas, Nevada, New Mexico, Ohio, South Dakota, Utah and Washington. See ILLINOIS LEGISLATIVE COUNCIL, *INDETERMINATE SENTENCE AND PAROLE LAWS*, *supra* note 3, and Hawaii Laws 1945, § 10842.

¹⁹ Fixed by court: Arizona, Colorado, Connecticut, District of Columbia, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Vermont, Wisconsin and Wyoming. Fixed by jury: Georgia, Tennessee and Texas. See ILLINOIS LEGISLATIVE COUNCIL, *INDETERMINATE SENTENCE AND PAROLE LAWS*, *supra* note 3, and D.C. CODE § 24-203 (Supp. III, 1954).

²⁰ *Harris v. Commonwealth*, 163, Ky. 781, 174 S.W. 476 (1915).

²¹ *Mason v. Brophy*, 235 App. Div. 432, 257 N.Y. Supp. 175 (1932).

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To counteract such action on the part of a court, or a jury, where it is allowed to fix the sentence, there should be some restraints in the law. Such restraint could be installed by providing in the law that the minimum sentence imposed should in no case exceed a certain fraction, one-third for example, of the maximum sentence imposed. In such case, there would always be time for the parole board to act if it saw fit. In case of a crime carrying a sentence of not less than one nor more than ten years, the least maximum which could be imposed would be three years and that could only be imposed if the minimum imposed were one year. The highest minimum would be three years in such case and then the maximum imposed would have to be nine or ten years.

*Indeterminate Sentence and Parole Laws
in West Virginia Prior to 1939*

West Virginia has had an indeterminate sentence law since 1903, but as a practical matter has only had such a law since 1939.

In 1903, the West Virginia Legislature enacted the following statute:

"Every sentence to the penitentiary of a person hereafter convicted of a felony, except for murder in the first degree, who has not previously been convicted of a felony and served a term in a penal institution, may be, if the court, having said case, thinks it right and proper, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the governor as in the case of paroled prisoners; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no such prisoner shall be released until after he shall have served, at least, the minimum term provided by law for the crime of which he was convicted; *provided*, that any person now serving a sentence in the penitentiary, or that may hereafter be sentenced to the penitentiary for two or more separate offences, where the term of imprisonment for a second or further term is ordered by the court to begin at the expiration of the first term and each succeeding term of sentence named in the warrant of commitment, shall be entitled to have his succeeding term or terms of imprisonment terminated by the governor, as provided by law, at the expiration of the first term of sentence named in said warrant of commitment, without serving the minimum term as herein provided under more than one of said sentences."²²

²² W. Va. Acts 1903, c. 45, § 46.

This law was amended in 1923 without any substantial change being made in it. It remained in effect until repealed in 1939 when it was replaced by our present indeterminate sentence law. It was undoubtedly an indeterminate sentence law as it had all the necessary elements. As a result West Virginia was listed by all writers as being one of the states having an indeterminate sentence law. But few of such writers recognized the fact that it was only permissive and not mandatory. As a result of this feature, nearly all sentences imposed from 1903 to 1939 were definite sentences. A survey of the commitment records of West Virginia Penitentiary for the years 1937 and 1938 showed that out of 2033 commitments only 43 received indeterminate sentences. The United States Attorney General's Survey of Release Procedures, published in 1939, stated that minimum and maximum sentences were imposed in West Virginia under this statute only by the twenty-third judicial circuit, which is composed of Berkeley, Jefferson and Morgan Counties and in occasional instances in other circuits.²³ My survey of the commitment records for 1937-38 bears this out to a large extent. However, the twenty-second judicial circuit, composed of Hampshire, Hardy and Pendleton Counties also used the indeterminate sentence to a large extent.

The twenty-third judicial circuit accounted for 22 out of the 43 indeterminate sentences meted out during those two years and the twenty-second circuit accounted for ten. All the counties in these circuits are in the eastern panhandle and the penitentiary commitments from nearly all of them are very low.

While this indicates that a permissive type indeterminate sentence law is almost the same as no indeterminate sentence law, this is not necessarily the case. One probable reason that the law was not used prior to 1939 was that most judges were not familiar with it and continued to sentence as they and their predecessors had in the past. Another and probably better reason was that there was no adequate parole system in West Virginia prior to 1939 as will be pointed out. As previously stated an indeterminate sentence law is of little value without an adequate correlated parole law. It would be unfair to sentence a person to a general sentence in the penitentiary, which would amount to the statutory minimum and maximum for the particular crime, when nearly all other persons sentenced for the same crime received a definite sentence which

²³ 1 U.S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 1160 (1939).

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would be less than the maximum in most cases. There was no parole department to check into the case and grant paroles and, unless the court used its influence to get a prisoner sentenced to an indeterminate sentence released, he might be forgotten and have to serve the maximum time.

It will be noticed that the above quoted statute contemplated parole. The preceding section of the same act provided for parole as follows:

"The governor shall have authority, under such rules and regulations as he may prescribe, to issue a parole, or permit to go at large, to any convict who now is, or hereafter may be, imprisoned in the penitentiary of this state, under sentence other than a life sentence, who may have served the minimum term provided by law for the crime for which he was convicted, and who has not previously served two terms of imprisonment in any penal institution for felony.

"Every such convict, while on parole, shall remain in the legal custody and under the control of the governor, and shall be subject at any time to be taken back within the enclosure of the penitentiary for any reason that shall be satisfactory to the governor, and at his sole discretion; and full power to retake and return any such paroled convict to the penitentiary is hereby expressly conferred upon the governor, whose written order, when attested by the secretary of state, shall be a sufficient warrant, authorizing all officers named therein to return to actual custody in the penitentiary any such paroled convict; and it is hereby made the duty of all officers to execute said order the same as an ordinary criminal process.

"This act shall not be construed to operate in any sense as a release of any convict paroled under its provision, but simply as a permit granted to such convict to go without the enclosure of the penitentiary, and while so at large he shall be deemed to be serving out the sentence imposed upon him by the court, and shall be entitled to good time the same as if he were confined in the penitentiary."²⁴

Under this statute West Virginia had a parole law without a parole system. The statute provided authority for the governor to parole, supervise and revoke paroles, but did not provide a manner for exercising such authority. It goes without saying that the governor of a state, busy with the affairs of state, does not have the time to investigate the advisability of parole in regard to even a few prisoners. Certainly he could not give consideration to every prisoner eligible for parole. The best he could do would be to give

²⁴ W. Va. Acts 1903, c. 45, § 45.

some consideration to the cases of those brought to his attention. Therefore, under such a system, the authority to parole would generally have been used in favor of those fortunate enough to have friends outside the prison who were willing to go to the trouble of bringing their cases to the attention of the governor forcefully enough to get consideration. However, sometime after the above statutes were passed the governor appointed a pardon attorney and a parole board to assist him in strictly advisory capacities in regard to parole applications.

The pardon attorney and parole board continued to aid the governor until the new parole law was enacted in 1939. The United States Attorney General's Survey of Release Procedures, published in 1939, contained the following note in regard to those officials.

"There is no express statutory authority for the appointment of either the pardon attorney or the parole board. These offices were established by former Governors, apparently under the general authority granted the Governor in these matters and the offices have been continued by succeeding Governors to the present day. The Governor states that it appears that no legislative recognition at any time has been given the parole board. Its members are paid from the Governor's civil contingent fund. The office of the pardon attorney was given legislative recognition by an appropriation of the legislature in 1905. W. Va. Acts Ext. Sess. 1905, ch. 1. An advisory board to investigate applications for pardons was created in 1899, amended in 1901. W. Va. Acts 1899, ch. 58; W. Va. Acts 1901, ch. 87. This entire statute was repealed by the language of the 1905 act making the original appropriation for the office of the pardon attorney."²⁵

While the governor thus secured aid in deciding as to the advisability of parole, there was still no investigating staff to ascertain facts concerning parole applicants. Presumably the parole board had access to, and used, the applicant's prison conduct record, but other than that it probably had to rely upon what interested, and often prejudiced persons, told it. A more important lack, perhaps, was the absence of any provision for the supervision, aid and counseling of parolees. Apparently the parolee was turned loose and so remained until he was unfortunate enough to violate some law, be thrown into jail and there recognized as a parolee and his case reported to the governor or parole board.

²⁵ 1 U.S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 1157 n.10 (1939).

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As a result of this lack of an adequate parole system, of the 997 commitments to the penitentiary in 1937, only 31 were paroled before the new parole law went into effect on February 21, 1939.

*Indeterminate Sentence and Parole Laws
in West Virginia After 1939*

In 1939, the West Virginia Legislature repealed the old indeterminate sentence and parole laws and enacted a new indeterminate sentence law,²⁶ and an entire new set of probation and parole laws.²⁷ This was the first attempt to correlate an indeterminate sentence law with a system of probation and parole in this state.

The new indeterminate sentence law provided:

"Term of Imprisonment for Felony; Indeterminate Sentence.—Every sentence to the penitentiary of a person convicted of a felony for which the maximum penalty prescribed by law is less than life imprisonment, except offenses committed by convicts in the penitentiary punishable under chapter sixty-two, article eight, section one of the code, shall be a general sentence of imprisonment in the penitentiary. In imposing this sentence, the judge may, however, designate a definite term, which designation may be considered by the director of probation and parole as the opinion of the judge under the facts and circumstances then appearing of the appropriate term recommended by him to be served by the person sentenced. Imprisonment under a general sentence shall not exceed the maximum term prescribed by law for the crime for which the prisoner was convicted, less such good time allowance as is provided by sections twenty-seven and twenty-seven-a, article five, chapter twenty-eight of this code, in the case of persons sentenced for a definite term. Every other sentence of imprisonment in the penitentiary shall be for a definite term or for life, as the court may determine. The term of imprisonment in jail, where that punishment is prescribed in the case of conviction for felony, shall be fixed by the court."²⁸

This law was mandatory and since 1939 all sentences to West Virginia Penitentiary, except for crimes where the maximum statutory penalty was life imprisonment or death or crimes committed by convicts in the penitentiary, have had to be general or indeterminate sentences. In fact, in a case where a court sentenced an

²⁶ W. VA. CODE c. 61, art. 11, § 16 (Michie 1955).

²⁷ *Id.* c. 62, art. 12.

²⁸ *Id.* c. 61, art. 11, § 16.

offender to a definite sentence of one year in the penitentiary on a worthless check charge after this statute was enacted, it was held that the sentence was unauthorized and that the indeterminate sentence law made it mandatory that a sentence of not less than one nor more than five years, the statutory penalty for such an offense, be read into and be considered a part of the sentence imposed by the court.²⁹

So, in regard to sentences affected by the indeterminate sentence law, the term of imprisonment is actually set as soon as a jury verdict of guilty is returned. The sentence is a general sentence to the penitentiary which shall not exceed the maximum prescribed by statute for the offense for which the prisoner was convicted. This apparently means that a court could sentence a person convicted of grand larceny to the penitentiary for the crime of grand larceny and then the warden could not hold such person longer than ten years, the maximum time prescribed by statute for that offense. In practice, it is done by sentencing the person to the penitentiary for not less than one nor more than ten years, the minimum and maximum prescribed by statute for grand larceny.

No substantial change has been made in this statute since it was enacted in 1939. It plainly puts West Virginia in the group of states having indeterminate sentence laws which provide that the court shall fix the sentence and that the statutory sentence is controlling.³⁰

The statute plainly contemplated parole, and that the director of probation and parole should have authority to release the prisoner before the expiration of his maximum term.

The article in the code, containing 22 sections, in regard to probation and parole which was enacted in 1939 by the West Virginia Legislature, is too long to set out in full in this report.³¹ The first eleven sections dealt with probation, and for the first time the trial courts in West Virginia were given the authority to place on probation persons over 21 years of age who were convicted of felonies. Prior to this time such courts could only place persons under 21 years of age convicted of non-capital offenses and persons of any age convicted of misdemeanors on pro-

²⁹ *Cohn v. Ketchum*, 123 W. Va. 534, 17 S.E.2d 43 (1941).

³⁰ See note 18 for other states in this group.

³¹ W. VA. CODE c. 62, art. 12 (Michie 1943).

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bation.³² The sheriff of each county had been probation officer for his county, except for a short period between 1929 and 1933, when certain large counties were authorized by statute to appoint some other person as probation officer.³³

The new law gave all courts with original criminal jurisdiction authority to place on probation all persons not previously convicted of a felony who were convicted of any felony the statutory penalty for which was less than life imprisonment. The court could appoint the sheriff or other person as probation officer, or it could avail itself of the services of the state probation and parole officer for that district. Thus, the act gave the courts additional powers as to probation at the same time that the indeterminate sentence law took away their power to impose definite sentences.

As a result of the probation feature of the new law many person who would previously have been sent to prison upon felony convictions were placed on probation. This change in the law was probably the principal reason that commitments to West Virginia Penitentiary dropped from an average of 1016 per year for the years of 1937 and 1938 to an average of 672 per year for 1947 and 1948.

The last eleven sections of the article dealt with parole. In this part was created the office of director of probation and parole. The director was to be appointed by the governor. He was given authority to release on parole at any time, with approval of the governor, any person imprisoned in any penal or correctional institution in the state, or in any city or county jail, under less than a life sentence who had not previously twice been convicted of felonies. Persons twice previously convicted of felonies could not be released on parole until they had served the minimum statutory time for the offense for which they were presently convicted, and persons sentenced to life imprisonment could not be released until they had served ten years, or fifteen years if twice previously convicted of felonies.

So, in most cases, prisoners could be released without having served their minimum sentence. Thus, the indeterminate sentence law, in reality, provided for a sentence for the maximum statutory time for the offense, and the prisoner had to serve that maximum unless sooner paroled, but the minimum sentence meant nothing

³² See. W. Va. Acts 1915, c. 801; W. Va. Acts 1927, c. 55; W. Va. Acts 1929, c. 29; W. Va. Acts 1933, c. 46.

³³ *Ibid.*

except in cases where the prisoner had twice previously been convicted of felonies.

All paroles had to be signed by the governor under this law, but this was generally done as a matter of course once the director of probation and parole recommended parole.

The director of probation and parole was given authority to appoint such state probation and parole officers as were necessary to the proper administration of the article. This authority was limited, of course, by the amount of funds appropriated for the department. Thus, for the first time, a staff of officers so necessary to a proper program of investigation of applications for parole and supervision and aid of parolees was provided.

The article set out certain conditions which parolees had to meet while on parole, and the director was given authority to prescribe additional conditions. The director was also given authority to revoke paroles at any time it appeared to his satisfaction that a parolee had violated any of the conditions of his parole. He was given the further authority to adopt rules and regulations governing the procedure in granting paroles. The procedure adopted was substantially the following: Soon after a prisoner was received at the penitentiary he was interviewed by a probation and parole officer who took his application for parole. This application included considerable personal data, the prisoner's version of the crime for which he was convicted and some character references. This application, along with a copy of the applicant's prior criminal record and prison conduct record to date, was sent to the director. The director then sent a copy of all this information to the probation and parole officer for the district in which the applicant was convicted. The prison conduct record was kept up to date by reports from the penitentiary to the director and the proper probation and parole officer.

As soon as possible after receiving the application the probation and parole officer would make an investigation of the case. Under the procedure the officer was supposed to check into the prospective home, employment opportunities and community sentiment toward the applicant. In obtaining the community sentiment the officer was supposed to interview the references furnished by the applicant, the victim of the crime or his immediate family, and other representative members of the community. The officer was then supposed to interview the judge and prosecuting attorney who participated in the trial of the applicant and get their recommenda-

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tions, after acquainting them with all the facts he had acquired during his investigation.

The completed report, along with the officer's recommendation, was then sent to the director and he reviewed the case, considering all known factors. If parole were denied, the case was supposed to be reviewed periodically until the applicant was paroled or had served his maximum sentence.

How well this procedure was followed depended upon both the director and his staff, of course.

The following is a short history of the probation and parole department as set out in a recent report from that department:

"For the six parole districts created during the period 1939-1942, six state probation and parole officers were named. These few men covered the entire state of West Virginia, an area of 24,282 square miles. The office staff was shortly increased to three and the number of state Probation and Parole Officers to eight. This status remained until 1946, when the Parole and Record Clerk at the Penitentiary was also required to serve as Probation and Parole Officer in the field. This made nine Parole Officers and nine districts of supervision. During 1948, the dual capacity of Parole and Record Clerk and Probation and Parole Officer was changed, thereby causing the employment of another Parole Officer. The total personnel of the department thus became fourteen, with a Probation and Parole Officer serving as Chief Probation and Parole Officer. The greatest increase in personnel occurred during the fiscal period ending June 30, 1952. The districts were increased from nine to fifteen; the office of Administrative Assistant to the Director was created, and two additional personnel for the main office were named. This status remained the same until the Board came into existence [in 1953]. The districts were then increased to seventeen and two more office personnel were employed; and, employed also were two Parole Officers for the new districts."³⁴

The probation and parole law remained almost unchanged until 1953 when the legislature amended it so as to create a three man parole board appointed by the governor to replace the director. The board was to be made up of not more than two members of one political party and at least one had to be a member of the West Virginia State Bar. The board was to meet at each penal or correctional institution at least twice a year, and each person eligi-

³⁴ WEST VIRGINIA BOARD OF PROBATION AND PAROLE, 1ST ANN. REP. 21 (1955).

ble for parole was to be interviewed by the board, or a member thereof. Thus, for the first time, prison interviews by the paroling authority were required. If parole were denied to an eligible person the board had to so notify the applicant, giving him a written statement of the reasons therefor.

In 1955, the legislature again amended the probation and parole law, and for the first time the board was given full authority to release on parole without the approval of the governor. For the first time it was required that first offenders serve the minimum of an indeterminate sentence or one-third of a definite sentence to be eligible for parole. Also, the board was required to review the case of each prisoner eligible for parole once a year. It was further required that the board, in reviewing an applicant's case, consider his prior criminal record and his prison conduct and industrial record as well as current reports of psychiatric examinations whenever they were available.

The procedure for investigation of applications for parole by the probation and parole officers has remained substantially the same as outlined above up to the present time.

After considerable study of the indeterminate sentence and parole laws of West Virginia and other states, it is believed by the maker of this study that West Virginia's present laws in those fields compare very favorably with the best in the United States. Admittedly there is considerable dissatisfaction with these laws among members of the legislature, judges, prosecuting attorneys and prisoners. As has been pointed out, however, many members of all these groups favor these laws. Some of the dissatisfaction may arise from a lack of complete understanding of the theory and workings of the laws. For this reason this report has gone to some length to set out such theory and workings.

But undoubtedly some of this dissatisfaction arises from other sources. One of the principal objections is that the sentencing power is taken away from the court who heard the evidence in the case and is given to a remote central agency, the parole board. But it is argued that while the parole board has not heard the evidence, neither has the court in many cases where there has been a plea of guilty. It is further argued that the parole board has an opportunity to get information of the convicted person's background, to study the person as a prisoner over a period of time and see if he shows signs of being ready to be released among

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members of society before releasing him on parole or deciding to keep him incarcerated for his maximum term.

Our present system of indeterminate sentencing does in effect put the sentencing power in the parole board since it has the power to say how long the prisoner shall serve before being released.

West Virginia Parole Board

Since the real sentencing power is in the hands of the parole board in West Virginia, such board should be required by statute to be outstanding, capable and above reproach. The judge, from whom the sentencing power is taken, has at least had to take rigid tests in the field of law.

In most states there are few, if any, statutory qualifications as prerequisites for appointment to the parole board. Many states which do have such requirements direct them at securing a non-partisan or bipartisan board rather than relating them to the appointee's training, experience or ability in the field of penology.³⁵ However, a few states do require some such training or experience as prerequisites to appointment. California law requires that of the three board members one shall be an attorney, one must have had practical experience in the handling of adult prisoners and one must be a sociologist in training and experience.³⁶ Florida law requires that a board of five persons with knowledge of penal treatment and administration of justice be appointed as an examining board which shall examine and investigate applicants for membership on the parole commission and compile a list of eligible applicants from such examinations and investigations from which list the members must be appointed.³⁷

Mississippi law requires that appointments to the board be made from a list certified by a special nominating committee after investigation, which list shall include only names of persons qualified by knowledge or experience to perform the duties of their office.³⁸ New Jersey law requires that board members be persons of recognized ability in the field of penology with special training or experience in law, sociology, psychology or related branches of

³⁵ ILLINOIS LEGISLATIVE COUNCIL, INDETERMINATE SENTENCE AND PAROLE LAWS, *supra* note 3.

³⁶ CALIF. PENAL CODE § 5075 (Deering, Supp. 1947).

³⁷ FLA. STATS. c. 947, § 947.02 (1953).

³⁸ MISS. CODE § 4004.01 (Supp. 1954).

social sciences.³⁹ A few other states have requirements similar to those of New Jersey.⁴⁰

The Standard Probation and Parole Act, prepared by a committee of penologists, sociologists, probation and parole personnel, judges and lawyers, provides for appointment to the board from a list of nine persons with knowledge and experience in correctional treatment or crime prevention submitted to the governor by a panel of five persons composed of a supreme court judge, president of the state bar association and others with like qualifications.⁴¹

These requirements aim at obtaining members on the parole board who can and are likely to do a good job. They also aim at getting persons on the board who are above criticism and are likely to be trusted.

The 1955 amendment of the parole law in West Virginia removed the requirement that at least one member of the parole board must be a member of the West Virginia State Bar, but the requirement that no more than two members could be of the same political party was retained. The amendment also added the requirement that each member of the board shall have had experience in the fields of social science or administration of penal institutions and be familiar with the principles and practices thereof.

It is not too hard to ascertain what the legislature meant when it required experience in the field of administration of penal institutions, but the alternative of experience in the field of social science is almost too broad to be of much value. If it helps, Webster's International Dictionary defines social science as,

"The science that deals with human society or its characteristic elements, as family, state, or race and with the relations and institutions involved in man's existence and well being as a member of an organized community;" or "One of a group of sciences dealing with special phases of human society, as economics, sociology, politics, ethics, etc."

Two of the three members of the present board were appointed before the 1955 amendment went into effect and the third was appointed immediately thereafter. According to the personal data in the West Virginia Bluebook for 1955, none of the three

³⁹ N. J. REV. STATS. § 80:4-123.1 (Supp. 1948-49-50).

⁴⁰ See MICH. COMP. LAWS § 791.80 (1948); OHIO GEN. CODE § 2209-2 (Page 1951).

⁴¹ NATIONAL PROBATION AND PAROLE ASS'N, STANDARD PROBATION AND PAROLE ACT § 3 (1955).

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members have had experience in the field of administration of penal institutions. The two older members of the board are lawyers and have practiced law, and the newest member is a lawyer who has practiced law and was Judge of the Municipal Court of Charleston for four years. Whether experience in the practice of law meets the requirements or not, certainly the experience of being a municipal judge in a large city for four years would come close to doing so.

This part of the amendment of the parole law is a step in the right direction it would seem, but the legislative intent in regard to the qualifications for membership on the board should be expressed more clearly so as to be a better guide for the governor and the senate. The board must be bipartisan in West Virginia, but no other attempt is made to keep politics out of the system. As long as this is true, and as long as a majority of the board is almost bound to be made up of one political party, the department will be accused of playing politics in granting paroles whether this is true or not. A system of appointment to the board similar to those systems set out in the Florida and Mississippi statutes might help in this regard.

Serving Minimum Sentence Before Parole

Another controversial point arising under indeterminate sentence and parole laws is whether a prisoner should be made to serve his minimum sentence before becoming eligible for parole. Such a requirement is contrary to the theory of parole, which is that the prisoner should be released when he is ready for release from confinement, and that after that time additional imprisonment may be detrimental. It is said that no legislature or judge can predetermine when a person will be ready for release and this can only be ascertained after observation of the prisoner and a thorough investigation into his background and opportunities. The fact that a certain time must be served before release in any event may remove some incentive for reform. All this is also true where there is a requirement, as in West Virginia at the present time, that persons serving a definite sentence must serve a certain portion of their sentence before they are eligible for parole.

As a practical matter, it takes some time for the parole machinery to work out and, where the minimum sentence is one year, it is unlikely that parole would be granted before that time in very many cases in any event. But where the minimum is two years, or

five years, the above objection is more valid. A first offender sentenced to five to 18 years for murder may be more ready for parole at the end of one or two years than at any later time. One writer states,

"The theory of parole is that most prisoners sooner or later reach a stage in their incarceration when it is better for themselves and society that they be released to spend the remainder of their sentence in supervised and helpful adjustment to life in the community, rather than remain in prison. . . . if at this stage in his imprisonment he is told that he must be kept a prisoner longer, his interest may flag, he may become discouraged and embittered, and when released may seek his revenge against society."⁴²

If this is true, it seems reasonable that a parole board would be better able to judge when an individual prisoner has reached that stage than the legislature, which must set a certain time for all members of a certain group in advance.

There is some public demand that minimum sentences be served under indeterminate sentence laws because of the general belief that a shorter time is served by prisoners under such laws than under definite sentences. That this is not true has already been pointed out. In fact, the West Virginia figures which show that prisoners served a much longer time under indeterminate sentences before parole than under definite sentences before unconditional discharge reflect a situation where the minimum sentence did not have to be served. This change in the law did not come about until after the years considered.

During the period from 1939, when West Virginia's mandatory indeterminate sentence law went into effect, until June 12, 1955, parole could be granted to first and second offenders, except those sentenced to life imprisonment, at any time as there was no requirement that they serve the minimum sentence. Only persons who had been twice previously convicted of felonies had to serve their minimum sentence before they became eligible for parole. Persons sentenced to life imprisonment had to serve ten years and those so sentenced who had twice previously been convicted of felonies had to serve 15 years before they were eligible for parole.⁴³

The law was changed by the legislature in 1955 to make it

⁴² Glueck, *Indeterminate Sentence and Parole Laws in the Federal System*, 21 B.U.L. REV. 20, 23 (1941).

⁴³ See W. VA. CODE c. 62, art. 12, § 16 (Michie 1949).

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mandatory that a prisoner serve the minimum of his indeterminate sentence or one-third of his definite sentence before he became eligible for parole.⁴⁴

Many authorities in the field of penology would say that the 1955 amendment was a step backward, but as a practical matter prisoners were being made to serve their minimum sentence and more in practically every case before the change in the law required it. A survey of the commitment records of our penitentiary for the years of 1947 and 1948 shows this was the case in West Virginia.

Furthermore, the Standard Probation and Parole Act, prepared by a committee of authorities in the fields of penology, sociology, law, probation and parole, provides that the minimum sentence be served before release on parole.⁴⁵ The committee was divided on this point, however, and it had to be submitted to another committee for decision. The final decision was made so as to incorporate some sentencing method which would give both the court and the parole board appropriate roles in the treatment process.⁴⁶ In connection with this, it should be remembered that in the standard act the court was given the power to set a minimum sentence which in no case could exceed one-third of the mandatory statutory maximum, or seven years, whichever should be less.⁴⁷

If prisoners were given credit for good time allowances⁴⁸ on their minimum sentence as well as on their maximum, the parole board would have more discretion in the matter of parole even though the minimum sentence was required to be served before parole could be granted. The Standard Probation and Parole Act

⁴⁴ See W. VA. CODE c. 62, art. 12, § 13 (Michie 1955).

⁴⁵ See NATIONAL PROBATION AND PAROLE ASS'N, STANDARD PROBATION AND PAROLE ACT § 18 (1955)

⁴⁶ *Id.* comment to § 12.

⁴⁷ *Id.* § 12.

⁴⁸ Since the allowance of "good time" is mentioned several times in this report, it would probably be helpful to explain how it is earned in West Virginia. W. VA. CODE c. 28, art. 5 § 27 (Michie 1955), provides that prisoners, other than life termers, shall have deducted from their term a reward for good behavior of five days per month on a one year sentence, six days per month on a two year sentence, seven days on a three or four year sentence, eight days on a five to nine year sentence, and ten days on sentences of ten years or more. *Id.* § 27a provides that the warden can allow, with approval of the governor, which is usually given, extra good time to prisoners who work inside or outside the penitentiary. The current practice is to allow ten days per month extra good time for each month a prisoner works. This does not mean that prisoners can get 20 days off per month for good behavior and work. They are allowed ten days per month on a ten year sentence, or an indeterminate sentence of from one to ten years, for good behavior. This

provides that good time be allowed on the minimum sentence.⁴⁹ This type provision gives the prisoner more incentive for reform. But it would not do so unless, as a practical matter, paroles were granted deserving prisoners before the expiration of their minimum sentence.

Perhaps the requirement that the minimum sentence be served before parole could be granted would be of more benefit if the minimum were not set in advance by the legislature. If the minimum could be set by the court in each individual case, within limits set by the legislature, then the requirement could serve a more useful purpose. As has been pointed out earlier in this report, 23 jurisdictions allow the court or jury to set the minimum and maximum sentences, 20 allowing the court to do so and the other three the jury. In 14 jurisdictions, including West Virginia, the statutory minimum and maximum sentences control. So it appears that in a decided majority of the jurisdictions having indeterminate sentence laws, the court is allowed to set the maximum and minimum time to be served. It was also pointed out that courts sometimes abused this power by setting the minimum and maximum times so close together that they formed a definite sentence in effect. But this practice could be curbed to a large extent by statute.

It has been pointed out that the Standard Probation and Parole Act provides that the statutory maximum is controlling in all cases, but the court can set a minimum sentence which must be served, less good time earned, before parole can be granted. To prevent the court from setting a very high minimum so as to practically make the sentence a definite one, the act provides that the minimum set by the court shall in no case exceed one-third of the maximum provided by law for the offense or seven years, whichever is less.

Requirement of Statutory Maximum Sentence

Closely connected with the problem of requiring the minimum sentence to be served before parole can be granted is the problem of whether the statutory maximum should be mandatory as it is in

means that they get 1200 days off a ten year sentence for good behavior. The ten days extra for work is allowed only for working a full month, and so by working five years, or sixty months a prisoner serving a ten year sentence can earn another 600 days good time. Thus a prisoner can possibly serve a ten year sentence in slightly over five years.

⁴⁹ NATIONAL PROBATION AND PAROLE ASS'N, STANDARD PROBATION AND PAROLE ACT § 12 (1955).

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West Virginia and under the standard act. As has been pointed out there were several dissenters on the Committee on the Standard Probation and Parole Act on this point. Such a requirement is not consistent with the theory of individual treatment unless it is correlated with power in the parole board to discharge from parole before the expiration of the maximum sentence. Perhaps here again the court should be given back a little more power in regard to the sentencing of convicted persons in West Virginia. As has been pointed out the court is given the power to set the maximum sentence in the majority of jurisdictions having indeterminate sentence laws.

A majority of the judges and prosecuting attorneys returning completed questionnaires which were sent to them during the course of this study indicated that they believed that the judge knows as much about the circumstances and advisability of parole of a person convicted in his court as the parole board knows after an investigation as such investigations are presently made. A bare majority of those responding were in favor of West Virginia's indeterminate sentence law, but almost half of them favored a definite sentence law. This indicates that about half of the judges and prosecutors, the group which administers such law, believe that the court should have more of the sentencing power.

Therefore, it might be the best approach to amend our indeterminate sentence law so as to conform to the laws of the majority of the states and give the court the power to fix a minimum and maximum time to be served within the limits prescribed by law for the offense for which the person is convicted. For example, since the statutory penalty for grand larceny is not less than one nor more than ten years, a court could sentence a person convicted of that crime to a term of not less than one nor more than ten years or any indeterminate time between those two extremes. To prevent the practice of setting minimum and maximum sentences so close together as to make the sentence a definite one in effect, it could be provided that in no case should the minimum sentence imposed by the court exceed one-third of the maximum sentence imposed. Thus, in the case of grand larceny, the least sentence the court could impose would not be not less than one nor more than three years and the longest minimum it could set would be three years and in such case the maximum would have to be nine or ten years. There would always be a time for the parole board to act even if the minimum sentence had to be served. It should be kept in mind

that the court has the power to place many offenders on probation in the first place instead of sentencing them to prison. Such a change would amount to somewhat of a compromise and would probably satisfy most judges and prosecutors who are dissatisfied with the present indeterminate sentence law. As long as the requirement that the minimum sentence must be served before parole can be granted is retained, this would give the court some control over both ends of the sentence. Very little of this control would be lost if good time were allowed to apply on the minimum as well as the maximum sentence. More would be lost if the parole board were given the authority to release from parole before the expiration of the maximum sentence which is discussed later.

Our present statute provides that the judge can recommend the amount of time which he thinks the convicted person shall serve. Many of the letters and questionnaires received during the course of this study contained the criticism that little or no attention was given such recommendation by the parole board. The change discussed above would rectify this situation as the sentencing court could at least fix the minimum time to be served.

Of course, this system would have an element that many authorities think is undesirable. That is that the individual case would be predetermined to a certain extent without the benefit of observing the person as a prisoner and the conducting of a thorough investigation before parole. The investigation could be made while the prisoner is serving the minimum sentence, but if it, his attitude and prison conduct indicate that immediate parole is desirable, the predetermination precludes this until the minimum sentence is served.

Another undesirable element of such a system would be the probable resulting disparity of sentences in different courts or even in the same courts. Some courts might habitually give the least possible sentence of one to three years for grand larceny for instance, and others might impose the statutory penalty of one to ten years and leave it to the parole board to parole when the board thought it advisable. Others might impose the highest minimum of three years. Such disparity insofar as the maximum is concerned could be cured to a large extent if the parole board were given the power to discharge from parole before the expiration of the maximum sentence.

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Discharge From Parole

Another closely related problem is whether the parole board should have the power to discharge parolees from parole before the expiration of their maximum sentence when circumstances indicate that this is desirable in individual cases.

There are many different types of statutes dealing with this type power. They range from the giving of power to the parole board to hold a parolee on parole for the rest of his life⁵⁰ to a limit on such power so that the parole period may not extend over four years in any event.⁵¹ The former type results because there is no statute requiring that the parole board discharge from parole and many states do not consider time served on parole as time served on the sentence. It is considered merely a suspension of the sentence. The latter was held to be the case in West Virginia in a fairly recent case,⁵² but since we do provide for a mandatory discharge from parole at the expiration of the maximum sentence⁵³ this decision only has effect if parole is revoked before the expiration of such sentence. Nearly all jurisdictions require a discharge from parole or make a discharge automatic at the expiration of the maximum sentence.

While several jurisdictions allow the parole board to discharge from parole at any time, some, like Michigan, require a certain time to be served on parole by persons who have been convicted of serious felonies like murder, rape, etc.⁵⁴ Some exclude life termers from the operation of their discharge provisions, but do allow them to be released from supervision.

Several jurisdictions require that all parolees serve a specific

⁵⁰ According to a study made in 1939, final discharge from parole in some states was left entirely up to the parole board, and so presumably the board could hold a person on parole for life. See 4 U. S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 290 (1939); see also 28 A.L.R. 947 (1922). This was because time served on parole did not count as served on the sentence. Since 1939, two of these states, Alabama and Kentucky, have changed their laws so that discharge from parole must be given at the expiration of the maximum sentence if it has not been granted sooner. However, the language of MINN. STATS. § 637.08 (Supp. 1956), and of the Minnesota court in *State v. Whittier*, 226 Minn. 356, 32 N.W.2d 856 (1948), indicate that the parole board may be able to hold a person on parole for life at the present time although the board has the power to discharge from parole at any time. The same seems to be true in Oklahoma as indicated by OKLA. STATS. tit. 57, §§ 332.10 and 346 (1941) and *Ex parte Mose*, 84 Okla. Cr. 134, 124 P.2d 264 (1942).

⁵¹ See ME. REV. STATS. c. 149 § 15 (1954).

⁵² *Watts v. Skeen*, 132 W. Va. 737, 54 S.E.2d 563 (1949).

⁵³ W. VA. CODE c. 62, art. 12, § 18 (Michie 1955).

⁵⁴ See MICH. COMP. LAWS § 791.40 (1948).

amount of time on parole before the board can discharge them. The required time in five jurisdictions is six months,⁵⁵ in five others it is one year.⁵⁶ New York allows discharge from supervision at any time, but the person is on parole until the expiration of his term.⁵⁷

Fifteen jurisdictions require that the parolee remain on parole until the expiration of his maximum sentence.⁵⁸ Nine others modify this by allowing the maximum sentence to be shortened by any good time allowed in prison and on parole.⁵⁹ The standard act provides that the parolee must be discharged at the expiration of his maximum sentence and that the parole board can discharge him at any time after one year on parole.⁶⁰

West Virginia allows its parole board very little discretion in the matter of discharge. The parolee is entitled to discharge at the expiration of the maximum period for which, at the time of his release from prison, he was subject to imprisonment. The parole board has the authority to discharge him from parole at the expiration of his maximum sentence, less good time earned while in prison and on parole.⁶¹ In short, the board has the authority to discharge a parolee at the expiration of his maximum sentence, less good time earned while in prison and on parole, and if it does not do so, the parolee is entitled to discharge at the expiration of his maximum sentence, less good time earned while in prison.

There may be less cause for giving the parole board authority to discharge from parole before the expiration of the maximum sentence in jurisdictions where the court can set the maximum sentence lower than the statutory maximum for the offense committed than in other states, like West Virginia, where the statutory maximum is mandatory in all cases where the indeterminate sentence applies. In those states the average maximum sentence would be shorter and the average time on parole consequently shorter. But even in those states the parole board may need the power to discharge at an earlier date to compensate for any disparity in sentencing.

⁵⁵ Arkansas, Illinois, Kansas, Nebraska and New Mexico.

⁵⁶ Idaho, Iowa, North Carolina, Oregon and Texas.

⁵⁷ See N. Y. LAWS, *Corrections* § 220 (McKinney, Supp. 1955).

⁵⁸ Alabama, District of Columbia, Florida, Georgia, Louisiana, Maryland, Mississippi, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Wisconsin and the United States.

⁵⁹ Colorado, Delaware, Massachusetts, Montana, New Jersey, North Dakota, West Virginia, Vermont and Wyoming.

⁶⁰ NATIONAL PROBATION AND PAROLE ASS'N, *STANDARD PROBATION AND PAROLE ACT* § 27 (1955).

⁶¹ See W. VA. CODE c. 62, art. 12, § 18 (Michie 1955).

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Some authorities in the field of penology say that too long a time on parole, like too long a time in prison, has adverse effects; that supervision does good only for so long and then it is worse than no supervision. If this is true, then either the West Virginia indeterminate sentence law which makes the statutory maximum sentence applicable in all cases, or the parole law making all parolees remain on parole until the expiration of their maximum sentence is not the best law. Parole theory, like imprisonment theory, should be the rehabilitation of the prisoner and to get him to conform to the rules of society. There probably should be a reward for conformity with parole rules and regulations in the form of early discharge from parole the same as there is a reward for conformity with prison rules and regulations through good time allowances and early parole. Perhaps both West Virginia laws should be amended. No doubt there is a difference between grand larcenies and between persons who commit grand larcenies.

If the parole board were given the power to discharge from parole when the best interests of society would be served by so doing, a lot of unnecessary supervision and its consequent cost would be eliminated. Parole officers would have more time for the supervision of other parolees and for investigation of applications for parole. Also, there would be more room for others on parole so that the prison population could be lowered.

One of the recommendations of West Virginia's Board of Probation and Parole in its 1954-55 report was that the board be given the power to discharge from parole at any time after a person serving a sentence of less than life imprisonment has been on parole for one year.

While not many states differentiate between life and less than life sentences, there may be some justification for doing so. West Virginia's Board of Probation and Parole suggests that it be given the power to release life termers from supervision, but not parole. As shown earlier in this report, this is done in some jurisdictions. Life termers on parole under the present system in West Virginia build up the parole officer's case load since they are to be supervised for life. Other states are hesitant to accept them for supervision because of the length of the time of supervision involved. These objections to the parole of life termers would be eliminated if the parole board's recommendation as to life termers were put into effect.